No. 21,019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

E. R. FITZSIMMONS,

Plaintiff and Appellant,

vs.

BRUCE W. GILPIN,

Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

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ATTORNEYS FOR APPELLANT

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JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the District Court is founded on Title , United States Code, Section 1331 (28 U.S.C. § 1331), in that aintiff (hereafter referred to as "appellant") was at all requis- e times a resident of the State of California, and defendant ereafter "appellee") was at all such times a resident of the stern District of the State of Washington.

JURISDICTION OF THE COURT OF APPEALS

Jurisdiction of this Court is derived from Title 28, ited States Code, Section 1291 (28 U.S.C. § 1291).

STATEMENT OF THE FACTS

A. The Lanphier Action.

The action is for payment of a promissory note, of the ue of $13,000.00. The note was delivered to General Petroleum poration, a New York corporation (now Mobil Oil Company, a New k corporation) on or about May 21, 1956, and bears a date of 16, 1956.

Sometime prior to May 12, 1962, the note was assigned to . Lanphier (hereafter "Lanphier") by Mobil Oil Company. Lan- er brought an action on the note on May 12, 1962 in the Superior rt of the State of California for the City and County of San ncisco. That action was entitled "H. N. LANPHIER vs. KWIK SHYNE ., a California corporation, BRUCE W. GILPIN, JAMES A. CAHILL" several Does, Number 521,586, (hereafter referred to as "the ginal Lanphier complaint.").

The original Lanphier complaint alleged that there was due and owing on the note the sum of $9,212.56. Under the , attached to the original Lanphier complaint, appellee Bruce ilpin (hereafter referred to as "Gilpin"), individually, and Shyne Ltd. (hereafter, "Kwik Shyne"), by Gilpin and James A. ll (hereafter, "Cahill") promised to pay the sum of $13,000.00 qual monthly instalments with interest, for one-hundred twenty hs, or until on or about May 16, 1966. The original Lanphier laint alleged that $9,212.56 was owing at the date of filing complaint. Kwik Shyne was served with the summons and original laint in the Lanphier action by service on the California etary of State.

Subsequently, the default of all defendants was entered, was later set aside by order of the court on November 28, 1962. mended complaint was filed January 25, 1963 and service of in and Cahill by publication was ordered on February 5, 1963.

Meanwhile, on January 30, 1963, Lanphier noticed the depo- on of Gilpin. On February 19, 1963, Gilpin obtained an order hing the notice, and ordering that the deposition not be taken. Shyne entered its Answer and Cross-Complaint to the amended hier complaint on or about March 1, 1963. Previously, Kwik e had received two extensions of time, totalling 30 days, in to plead to the complaint.

On March 8, 1963, Gilpin and Cahill, purporting to r specially, received an order extending time to plead to mended Lanphier complaint to April 2, 1963.

On March 19, 1963, Lanphier filed her Answer to the oss-Complaint of Kwik Shyne. On April 2, 1963, the clerk of the perior Court issued a Notice of Trial Setting. Counsel for ik Shyne, by letter to the clerk, then requested that the ac- on be taken off the trial calendar.

Special appearances and motions to quash service of mmons on Gilpin and Cahill were set for April 9, 1963, but re continued by stipulation of counsel to April 24, 1963. On ril 25, 1963, the court ordered the summonses served on Gilpin d Cahill quashed.

On May 21, 1963, Lanphier noticed a motion for June 6, 63 (subsequently continued to June 20, 1963) for an order com- lling the attendance of Gilpin at a deposition to be held in kland, California. On or about June 28, 1963, counsel for fendants requested, and received, a continuance of the hearing that motion to July 5, 1963.

On July 5, 1963, Lanphier filed a Second Amended nplaint adding a second cause of action for fraud. An order owing the filing of that second amended complaint was granted July 11, 1963.

On July 11, 1963, the Superior Court ordered that the osition of Gilpin be taken in Oakland, on condition that Lan- er pay the round trip air fare for Gilpin from Seattle-Tacoma San Francisco, plus $25.00 per day expenses. The date of the osition was set by agreement for August 1, 1963, and subse- ntly continued, also by agreement, to August 30, 1963.

On or about August 29, 1963, an amended order and stip-
tion permitting filing of the Second Amended Complaint was
ed, to supersede the prior order of July 11, 1963. On August
1963, the deposition of Gilpin was taken in Oakland, and Gil-
was served with the summons on the second amended complaint
that time.

On September 11, 1963, Kwik Shyne demurred and moved
strike the second amended complaint and the second cause of
ion thereof, and Gilpin moved to quash the above-mentioned
vice of summons. On October 23, 1963 the court ordered the
shing of the service on Gilpin which had occurred in Oakland
the previous August 30th.

B. The FitzSimmons Action.

Unable, after the passage of almost eighteen months
the filing of three complaints, to obtain jurisdiction of
pin, and convinced that Kwik Shyne had no assets to satisfy
judgment on the note, Lanphier assigned the note and cause
action to appellant herein. The present action was brought,
October 24, 1964, in the United States District Court for the
ern District of Washington, Northern Division. On December
1964, the appearance of Gilpin was entered by new attorneys.

On January 28, 1965, a dismissal without prejudice of
Lanphier action in the California Superior Court was entered.
r about December 29, 1964, Gilpin (hereafter referred to as
pin") moved to transfer the action from the Northern Division

the Western District of Washington to the Southern Division. the same time, appellee noticed motions to strike under Rule f the Local Rules of the Western District[1] (footnotes are in Appendix, infra), and to dismiss on the ground of another ion pending.

Apparently only the motion to transfer to the Southern ision was ever heard by the District Court, and an order was e on January 18, 1965 transferring the action. Appellee there- er did not renew his motions to strike and to dismiss.

On February 11, 1966, appellant was notified by the rk of the District Court that the court's motion to dismiss er its Local Rule 10[2] was set for March 7, 1966. Associated nsel appeared for appellant on that date. The Court, by minute er, ordered the action dismissed. This appeal followed.

ISSUES TO BE DECIDED

The issues before this Court are:

1. Was it an abuse of discretion for the District rt to dismiss the action with prejudice?

2. Did the District Court abuse its discretion lismissing the action, with or without prejudice?

SPECIFICATIONS OF ERROR

Appellant contends that the District Court made the lowing errors:

1. The District Court abused its discretion in

issing the action with prejudice.

2. The District Court abused its discretion in issing the action, whether with or without prejudice.

ARGUMENT

Summary of Argument

The District Court's scope of permissable discretion he area of dismissals for failure to prosecute pursuant to l rules is gauged by the same rules as are applicable to 41(b) of the Federal Rules of Civil Procedure. Recent s have stressed that the rights of litigants are to be con- red foremost by the District Courts, and that the "public rest" of keeping dockets free from inertia is a consideration ndary in importance to those rights. The cases have empha- i the factor, inter alia, of prejudice to the other party, r than solely the convenience of courts, as a more crucial rion in determining whether failure to take action during uired period of time should result in dismissal. Appellant nds that the history of the litigation between the parties e present action does not dictate a result so disastrous to lant as the dismissal of his claim, and that, in any event, ourt abused its discretion in dismissing the action with dice.

Argument

I

WHILE ORDINARILY A DISMISSAL FOR FAILURE TO PROSECUTE WITH PREJUDICE UNLESS THE COURT SPECIFIES OTHERWISE, THE MISSAL SHOULD BE WITHOUT PREJUDICE WHERE THE DEFENDANT'S IONS REQUIRE PLAINTIFF TO TAKE ON EXTRAORDINARY AND ADDITIONAL DENS IN ORDER THAT THE DISPOSITION OF THE ACTION MIGHT BE EDITED.

Appellant is forced to assume that the Court's dis-sal was with prejudice, and that the dismissal would operate as adjudication on the merits. Federal Rules of Civil Procedure, e 41(b); American National Bank & Trust Co. of Chicago v. ted States, (App. D.C. 1944) 142 F. 2d 571; Hicks v. Bekins ing & Storage Co., (C.C.A. 9th, 1940), 115 F. 2d 406. Under se circumstances, the District Court's action should be utinized more closely than if the dismissal were without prej-e.

Costello v. United States, 365 U. S. 265, 81 S. Ct. (1961), makes an important point with respect to the kinds situations where policy dictates penalizing a plaintiff by sissing with prejudice. The issue before the Supreme Court s whether a dismissal for failure of the plaintiff (the Govern-) to file an affidavit of good cause was a dismissal "for of jurisdiction" under Rule 41(b) and thus without preju-unless otherwise specified by the court. In holding in the rmative on that issue, the Court spoke of the several classes situations under Rule 41(b) where the dismissal, unless rwise specified, was with prejudice, including motions to

ɜmiss for failure to prosecute:

> "All of [these kinds of dismissals with prejudice] enumerated in Rule 41(b)...primarily involve situations in which the defendant must meet the merits because there is no initial bar to the court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the court specifies otherwise, bar a subsequent action. ... Although a sua sponte dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the court's reaching the merits." 365 U.S. 265, 286, 81 S. Ct. 534, 545.

In the present case, what appellant's "failure" in
:t amounted to was nothing more than his failure to request
:ry of default and default judgment, prior to appellee's notice
motions to transfer, strike and dismiss, on December 29, 1964.
er these motions were noticed, but not heard, appellee, having
hnically satisfied the necessity of entering a responsive
ading, but without actually doing so, sat back and did nothing,
avoided the necessity of having to meet the merits. What oc-
red here is not the situation described in the Costello case,
ra, i. e., the situation where the plaintiff failed to do the
ngs that only he is in a position to do to bring the action
trial. It seems clear that a dismissal with prejudice should
ult only in those situations where there is nothing left for the
endant to do in order that the action might proceed to the next
ge, and the plaintiff fails to take the steps that, in the
inary course of litigation, are his responsibility. In the
sent case, appellee effectively placed a double burden on appel-

it. Appellant could not move toward bringing the case to trial fore appellee had entered a responsive pleading. Nor could ellant, after December 29, 1964, attempt to secure a default dgment. The only course available to him after that date was move for a summary judgment. But this would have placed on him th den of a court appearance, at a distance of more than a usand miles from appellant's residence, merely to force appel- to enter a full defense, which in the ordinary course of liti- ion should have been within twenty days after service of the mons. Appellant's chances of obtaining a summary judgment at t stage were slim at best, since the court was most likely to use the summary judgment and merely require appellee to enter responsive pleading within a prescribed time. That possibility not trouble appellee, since eventually he would be required answer in any event, unless the action were dismissed by ap- lant voluntarily. So appellee did just enough to avoid a ault, and in refusing to do more, placed an added, and unjusti- d burden on appellant to move to force appellee to defend the im. Appellant contends that because of this added burden, ed on him not merely as a result of his own recalcitrance, but gely by that of appellee, it was an abuse of discretion for court to dismiss the action with prejudice.

II

A DISMISSAL WITH PREJUDICE CONSTITUTES AN ABUSE OF RETION WHERE THE COURT MOVES TO DISMISS VIRTUALLY SIMUL- OUSLY WITH THE EXPIRATION OF THE PERMISSIBLE PERIOD OF TIVITY UNDER ITS LOCAL RULES, WHERE THE DELAYS ARE AT LEAST LY CAUSED BY THE DEFENDANT, AND WHERE DEFENDANT IS NOT PREJ-

The appellate cases concerned with dismissals for lure to prosecute seem largely to have been decided on the ticular circumstances presented in each case. See Link v. ash R. Co., 370 U.S. 626, 82 S. Ct. 1386 (1962); Sandee Mfg. v. Rohm & Haas Co., (C.A. Ill., 1962) 298 F. 2d 41. The im-tant factors seem to be:

(a) The length of time elapsing between the end of allowable period of inactivity under the local rule, and the rt's motion to dismiss the action;

(b) Whether the plaintiff was clearly dilatory shown by attempts by plaintiff to impede the progress of the igation;

(c) Whether or not the party benefitting from a nissal was himself prompt in pursuing the methods of disposi-n available to him; and

(d) The amount of ultimate prejudice to such y.

In Sykes v. United States (C.A. 9, 1961) 290 F. 2d 555, action had been inactive for twenty-eight days beyond the local 's permissable period of of inactivity--six months, when the n to dismiss was made. This Court held that the trial court abused its discretion in dismissing for want of prosecution, e reserving the right of the lower court to reconsider the on to dismiss if the defendant could show prejudice. In the ent case, the trial court noticed its motion to dismiss on uary 11, 1966, one year and twenty-four days after the action been transferred to it. While it is true that the action had

teen months previously, the action had been delayed approximately ee weeks, between December 29, 1964 and January 25, 1965, as esult of appellee's motion to transfer from the Northern Div- on of the District, to the Southern Division.

That appelee has not been prejudiced by any delay in secuting the action is clear. On the contrary, he has re- ved nothing but benefit from appellant's inactivity, which ctivity has contained a large measure of leniency with respect requiring appellee to plead a defense. While the action was ed on October 27, 1964, appelee failed to file any responsive ading until December 29, 1964. Even then, appelee delayed an itional twenty days after noticing his motions to transfer, ike and dismiss, before bringing the first mentioned motion to earing. Then, apparently satisfied with his success in trans- ring the action to the Southern Division, he never brought on hearing his motions to dismiss and to strike, and never filed esponsive pleading of any kind thereafter. After a successful ble that appellant would not take his default without some or notice, and later, when he had avoided that possibility hout having to answer, unwilling to bring the litigation to stage where it would at least be at issue, he now seeks to it from the work that the District Court has done for him.

This tactical maneuvering on the part of the appellee, using the inconvenience of an appearance in Washington by the llant to avoid the necessity of having to answer the claim,

d have required appellant to take additional steps, beyond usual burden placed upon him as a plaintiff to move the gation to a conclusion. Appellee's actions are tantamount elibertate delay by him. Where there is delay by both parties, where no prejudice results to the defendant from plaintiff's y, the court should not dismiss the action. Wholesale Supply v. South Chester Tube Co., (E.D. Pa., 1957), 20 F.R.D. 310; oro Co. v. Fisher & Porter Co.,(D.C. Pa., 1961), 29 F.R.D.

A dismissal where the plaintiff was not alone at fault is buse of discretion. Carnegie National Bank v. City of Wolf t (C.C.A. 9, 1940), 111 F. 2d 569; see also International Har- er Co. v. Rockwell Spring & Axle Co., (C.A. Ill., 1964) 339 d 949 (defendant's failure to answer complaint, inter alia, dismissal unjustified).

"Dismissal is a harsh sanction and should be resorted nly in extreme cases." Meeker v. Rizley, (C.A. 10, 1963) 324 d 269. In Alamance Industries, Inc. v. Filene's, (C.A. 1, 1961) F. 2d 142, cert. den. 368 U.S. 831, 82 S. Ct. 53 (1961), the t commented:

> "Apparently what principally lay behind the district court's determination to try the case is to be found in its remark made at the first hearing, that the 'public interest' in not having a case lie on its docket for fourteen months must control 'regardless of the interest of the parties.' We cannot accept that statement either as the formulation of a generally applicable principle or as a proper criterion for the disposition of this particular case. Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. Complaints heard as to the law's delays arise because the delay has in-

> For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary conseiderations over primary." 291 F. 2d 142, 145.

In summary, appellant contends that his rights have been regarded in the District Court's zeal to keep a 'clean' endar. The history of the litigation between the parties eto, beginning with the Lanphier action, is not one of conit and continuing delays by appellant. The California state rt action failed to be concluded only because of appellee's cessful evasion of that court's jurisdiction. Appellant, n pursuing the claim in a forum that gave no justification any claim of inconvenience to appellee, but instead, placed rden of distance on appellant, was frustrated by a different ic to avoid the claim: for instead of meeting appellant's m on the merits, appellee sought to, and did, use to his ntage the fact that it would be burdensome for appellant ave to appear in the Washington District Court. Appellee efore attempted to force the necessity for such an appear- by noticing what would have been responsive pleadings, pt for the fact that appellee never brought them on for a ing. While the burden is properly on the plaintiff to ecute the action to a conclusion, that burden should not be d to by the evasiveness of the defendant in meeting his en of answering the claim, particularly when the result of ing to meet such additional burden is dismissal with prejudice.

In view of the foregoing circumstances, not only was it abuse of discretion for the trial court to dismiss with prejudice, but for the court to dismiss at all, since defendant nefitted from the delay, the court's local rule had been violated ly by a matter of less than one month, and the delay had been used at least partly by the actions of appellee.

Appellant urges that the judgment of dismissal be versed.

ted: July 5, 1966.

Respectfully submitted,

FITZSIMMONS AND PETRIS

By_____
Anthony W. Hawthorne

Attorneys for Plaintiff and
Appellant Edward R. FitzSimmons

APPENDIX

1. Rule 5 of the General Rules, United States District Court for the Western District of Washington, is now General Rule 2(d):

> "Any member in good standing of the bar of any court of the United States, or of the highest court of any other state, or of any organized territory of the United States, may be permitted upon application to appear and participate in a particular case if there shall be joined of record in such appearance an associate attorney having an office in this District and admitted to practice in this Court who shall sign all pleadings prior to filing and otherwise comply with Rule 4(a) hereof."

2. Rule 10 of the Civil Rules, United States District Court for the Western District of Washington, is as follows:

> "All cases that have been pending in this Court for more than one year without any proceeding of record having been taken may be dismissed by the Court on its own motion for want of prosecution."

CERTIFICATION

I, Anthony W. Hawthorne, certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Anthony W. Hawthorne

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APPELLEE'S ANSWERING BRIEF

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1116 Washington Building
Tacoma, Washington 98402

ATTORNEYS FOR APPELLEE

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JURISDICTION OF THE COURT OF APPEALS

Jurisdiction of this Court is derived from Title 28, United States Code, Section 1291 (28 U.S.C. § 1291).

STATEMENT OF THE CASE

This action is based on a promissory note which was executed on or about May 16, 1956. The complaint in this action was signed on August 24, 1964, and filed in the United States District Court for the Western District of Washington, Northern Division, on October 27, 1964, and served on the defendant, BRUCE GILPIN, on November 16, 1964. On December 4, 1964, your author filed a duplicate original Notice of Appearance with the Clerk of the District Court in Seattle, Washington. On same day, a letter was written to Fitzsimmons and Petris, attorneys for the plaintiff, enclosing the original and one copy of the Notice of Appearance, and requesting them to acknowledge service on the original and return it to my office for filing. This letter was never answered, nor has the Notice of Appearance ever returned.

On December 29, 1964, your author filed a motion asking for alternative relief.

(1) To transfer the action to the Southern Division based on the residence of the defendant.

(2) To dismiss the action on the grounds that another action was pending on the same subject matter.

(3) To strike all pleadings of the plaintiff for his failure to associate resident counsel within ten days of the filing of the suit as required by Local Rule 5[1] (footnotes in appendix) of the District Court for the Western District of Washington.

On this same day, December 29, 1964, I wrote to Fitzsimmons and Petris, noticing this motion for January 11, 1965. This motion was heard on January 18, 1965 and even though no one appeared on behalf of the plaintiff, the Court granted only the motion to transfer the action to the Southern Division, but without prejudice to the defendant's motion to strike the pleadings and to dismiss the action, giving the plaintiff additional time in which to comply with Local Rule 5[1]. On March 1, 1965, the Clerk of the District Court advised Fitzsimmons and Petris of the action of the Court. Again nothing was ever heard from them.

On February 10, 1966, fifteen and one-half months after the complaint had been filed, the Clerk of the District Court, Southern Division, advised all parties that the cause was to be placed on the court calendar for March 7, 1966, under Local Rule 10[2] for dismissal for want of prosecution. On March 4, 1966, Conrad, Kane and Vandeburg filed their notice of association as local counsel in the action. On March 7, 1966, the motion to dismiss was argued by both sides, the Court listened to the arguments, examined the affidavit of the plaintiff, E. R. Fitzsimmons, found that no good cause or adequate explanation for the delay existed, and dismissed the action by minute order. This appeal followed.

ISSUE TO BE DECIDED

The only issue before this Court is: Was it an abuse of discretion for the District Court to dismiss the action on its own motion?

ARGUMENT

The District Court's authority to dismiss a case where the plaintiff as failed to prosecute the action with reasonable diligence is found in ule 41(b) of the Federal Rules of Civil Procedure, and Rule 10[2] of the ivil Rules of United States District Court for the Western District of ashington, and is also an inherent power of the said Court. In Shotkin v. estinghouse Electric and Manufacturing Company, (C.A. Colo., 1948) 9 F. 2d 825, 826, the Court said:

> "A District Court of the United States is vested with power to dismiss an action for failure of the plaintiff to prosecute it with reasonable diligence. The power is inherent and independent of any statute or rule. And where plaintiff has failed to prosecute the action with reasonable diligence, Court may dismiss it on motion of the defendant or on its own motion....."

The appellant in his brief has attempted to bring before this Court cts outside the record, by what he refers to as the "Lanphier Action." his is not only undesirable, but is not authorized. See Russell v. unningham, (C. C.A. 9, 1956) 233 F. 2d 806, 809, where the Court said:

> "Both parties in their brief seek to bring before this Court facts outside the record made below, but such an attempt to enlarge the record must be rejected..."

The only facts material to decide the issue in this case are the facts ntained in the record. An examination of that record reveals the total sregard by appellant of the rules of not only the United States District urt, but also of this Honorable Court -- specifically (Tr.1) letter from strict Court Clerk to Fitzsimmons and Petris requesting cost bond of non-

esidents dated 9/2/64; (Tr. 2) letter from District Court Clerk to Fitzsimmons nd Petris advising non-resident cost bond not yet received dated 10/5/64; Tr. 3) letter from District Court Clerk to Fitzsimmons and Petris returning omplaint for failure to file non-resident cost bond dated 10/16/64; (Tr. 106) etter from Circuit Court of Appeals Clerk to Fitzsimmons and Petris dvising record on appeal not transmitted if designation of record not iled dated 4/25/66.

To further demonstrate the lack of interest the appellant had in rosecuting his lawsuit, I refer to the motion to set aside order of dismissal, ith affidavits of Yancey Reser and William D. Gowans, and especially ne affidavit of James K. Moore (which are Tr. 65, 77 and 83).

I quote from the affidavit of James K. Moore on the second page:

> "On January 20, 1964, I wrote a letter to Mr. Fitzsimmons copy of which is attached as Exhibit A. I received no answer to this letter.
>
> On February 18, 1964, I received a verbal report of the status of the account through Mr. R. H. Buchanan, one of the corporation attorneys for Sony-Mobil Oil Company, Inc., stating that Mr. Fitzsimmons expects to get a judgment and full recovery within six months.
>
> On September 21, 1964, I wrote a letter to Mr. Fitzsimmons, a copy of which is attached as Exhibit B. I received no answer to this letter.
>
> On October 27, 1964, I sent a tracer to Mr. Fitzsimmons, a copy of which is attached as Exhibit C. I received no answer to this tracer.
>
> On November 11, 1964, I again wrote to Mr. Fitzsimmons, a copy of which letter is attached as Exhibit D. I received no answer to this letter.

On November 30, 1964, I telegraphed to Mr. Fitzsimmons a copy of which telegram is attached as Exhibit E. I received a letter from Mr. Fitzsimmons' secretary dated November 30, 1964, a copy of which is attached as Exhibit F, stating in effect that Mr. Fitzsimmons was out of the country.

On March 17, 1965, I wrote a tracer to Mr. Fitzsimmons, a copy of which is attached as Exhibit G. I received no answer to this tracer.

On March 31, 1965, I sent a certified mail letter to Mr. Fitzsimmons, a copy of which is attached as Exhibit H. Again I received no answer.

On July 27, 1965, I telephoned Mr. Fitzsimmons at his office in Oakland, and he informed me that the documents were in the Court in the State of Washington and promised to send us a full report.

To the date of this affidavit, I have never received any reports from Mr. Fitzsimmons as to the status of the case, and have no personal knowledge of the status of any lawsuits instituted by Mr. Fitzsimmons in regard to this matter.

Some date prior to December 8, 1965, I consulted with our house counsel, Mr. William D. Gowans, regarding the matter of determining the status of the collection suit or suits filed by Mr. Fitzsimmons, after which I left the matter and files in the hands of Mr. Gowans for his further checking. I know that Mr. Gowans wrote Mr. Fitzsimmons on December 9, 1965, but has never received from Mr. Fitzsimmons any written reply or report on the status of any lawsuits filed by Mr. Fitzsimmons.

The above is true and correct to the best of my knowledge and recollection.

(Signed) James K. Moore."

This case is clearly not one of ordinary neglect on the part of the

ppellant to prosecute the action in the District Court, but is one of gross

ouse at every stage of the proceedings. The note itself, which was the ubject matter of the action in the lower Court, is itself over ten years d and the subject of prior litigation. In this regard, see Salmon v. City Stuart, Florida, (C.A. Fla. 1952) 194 F. 2d 1004, where the Court said:

> "When it comes to the merits though, we think it plain that the order should be affirmed. Putting to one side that what is being litigated here is old straw which has been thrice threshed, or sought to be threshed, in the Courts, it stands undisputed that, following the filing of this the third suit, no action was taken by the plaintiffs for one year and three months. Matters standing thus, the Court was fully authorized to dismiss the action. The Order of Dismissal is affirmed...."

The appellant further in his brief suggests that the burden to push the atter to a final determination somehow rests upon the defendant. This is t only a preposterous proposition, but in addition, the record discloses d the defendant renoted this motion to strike the plaintiff's pleadings, e said motion would almost certainly have been granted. For although otion was filed December 29, 1964 under Local Rule 5[1] of the United ates District Court for the Western District of Washington, the plaintiff d not associate local counsel until March 4, 1966, which is a period of tter than fourteen months, and in addition, is almost a month from e date that the Clerk of the District Court wrote to the plaintiff advising at the cause was to be placed on the Court calendar on March 7 for smissal under local Rule 10[2] (Tr. 32). In this regard, see Hicks v. kins Moving and Storage Co., et al, (C.C.A. 9, 1940) 115 F. 2d 406, 409, when this Court said:

> "This power to dismiss for want of prosecution may be exercised by the Court on its own motion though no action to secure such result be taken by the defendant. (citing cases) Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the intending dismissal, for subsequent diligence is no excuse for past negligence. (citing cases)
>
> The duty rests upon the plaintiff at every stage of the proceeding to use diligence to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing the action for lack of prosecution, its decision will not be disturbed on appeal....."

Appellant further complains that the fact that he brought the action n the United States District Court for the Western District of Washington, which was obviously the proper forum under the circumstances) placed a urden of distance on the appellant, and that the appellee's motion was me kind of frustrating tactic to put an additional burden on appellant appear in the Washington District Court. This argument overlooks ree significant facts:

(1) The appellant chose the forum in which to proceed and

(2) Had appellant complied with Local Rule 5[1] and associated cal counsel, he would not have only avoided the necessity of traveling to e Washington District Court, but would have provided a local representa- e that appellee could serve papers on and otherwise communicate with.

(3) That the District Court, and not the appellee, made the motion to dismiss for failure to prosecute.

The appellant further charges the appellee with delay. This is not true, and the record so discloses. The Summons and Complaint were served on November 16, 1964 (Tr. 13). Appellant was retained on December 4, 1964, and filed his Notice of Appearance on that date (Tr. 14). On December 29, 1964, he filed a Motion to Transfer, Strike and Dismiss. This motion was noticed immediately and was called for hearing on the first available motion day, which was January 11, 1965. This motion was continued by the Clerk until January 18, 1965, at which time it was heard, as previously set forth. The Honorable Judge Beeks of the District Court granted the Motion to Transfer, and continued the Motion to Strike and Dismiss in an act of indulgence toward the appellant. Had the appellant at this juncture complied with the rules -- that is to say, appointed a local representative as required under Local Rule 5[1] who would have advised appellee that the action pending in California had been dismissed, the motion would have then been academic, and appellant would have been in a position to demand an answer and note the matter down for trial. In this regard, no request, demand or otherwise has ever been made of appellee to answer or note the motion. As a matter of fact, the only letter that has been received by the appellee from the appellant's attorney to date was received on June 24, 1966.

There isn't any question, and the record in this case clearly emonstrates that the appellant was not only guilty of gross negligence, nd without an adequate explanation for the delay, but is also guilty of total disregard of the Federal Rules of Civil Procedure, as well as e Local Rules of the United States District Court, and that the appellant ad to be prejudiced by the long delay. In this regard, see William R. ussell v. William Cunningham, Supra, at page 810:

> "The facts supported by the record are that the case had been pending for fifteen months with little action on the part of the appellant to bring it to trial, and two continuances had been granted. ******Appellant argues that on the facts supported by the evidence in the record it was a 'gross abuse of discretion' to deny a continuance or a dismissal without prejudice. **** However, defendants should not be kept with lawsuits hanging over their heads for long periods of time as litigation expenses mount. (Emphasis supplied.) The Courts also have an obligation to other litigants to keep their calendars clear as was pointed out in Boling v. United States, (C.C.A. 9) 231 F. 2d 926, 927. 'One of the causes of the congestion of the trial dockets is the failure of the courts to exercise the authority vested in them, thus to dispose of cases which are shaky or unfounded, but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the innate hesitancy mentioned above. Because of this fact, an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion and, of course, such a situation is never presumed.'

> continuances and no sign that the appellant was any nearer to trial in August of 1955 than he was in April of that year or in June of the previous year at the time of the pre-trial order. While the case involves nowhere near the abuses found in the typical situation where F.R.C.P. 41(b) is invoked it cannot be said that the District Court abused its discretion without resorting to contentions of fact not found in the record....."

In summary, the burden rests upon the plaintiff at every stage of he proceedings to prosecute his action with diligence. Upon his failure o do so, under the Federal Rules of Civil Procedure, the Local Rules nd the inherent powers of the District Court, his case may be dismissed, nd unless he can show good cause or has an adequate explanation for he delay, the Court is within its authority in dismissing the same. In his case, not only do we have a considerable length of time -- fifteen nd a half months -- but we have total inaction on the part of the appellant ith absolutely no excuse whatsoever on the part of the appellant, except erhaps the affidavit of Edward R. Fitzsimmons. (See Tr. 37 and 41.) light of the foregoing, it must be presumed that the appellee was rejudiced by the actions of the appellant and that the lower Court did ot abuse its discretion in dismissing the action. See Link v. Wabash, 1 F. 2d 542, Affirmed 370 U. S. 626, 8 L. Ed. 2d 734:

> "Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings...."

Appellee urges that the judgment of dismissal be affirmed.

ted: July 26, 1963

Respectfully submitted,

GAGLIARDI & GAGLIARDI
By Thomas A. Gagliardi

APPENDIX

Rule 5 of the General Rules, United States District Court for the

estern District of Washington:

> "If a party in any civil cause does not appear in proper person, and if the attorney appearing for such party does not maintain an office within this State, there shall be joined of record in such appearance, within ten (10) days thereafter, an associate attorney having an office in this District and admitted to practice in this Court; in default of which, all pleadings filed in behalf of such party may be stricken out by the Court, either upon motion or it's own initiative. The appearance of such associate attorney shall state his office address in this State and service of all papers at such office shall have the same effect as if such office address were that of the attorney originally appearing."

le 5 of the General Rules is now General Rule 2(d).

Rule 10 of the Civil Rules, United States District Court for the

stern District of Washington, is as follows:

> "All cases that have been pending in this Court for more than one year without any proceeding of record having been taken may be dismissed by the Court on its own motion for want of prosecution."

CERTIFICATION

I, Thomas J. Gagliardi, certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas J. Gagliardi

Thomas J. Gagliardi

No. 21,019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. FITZSIMMONS,

Plaintiff and Appellant,

UCE W. GILPIN,

Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

FITZSIMMONS AND PETRIS
405 Fourteenth Street
Oakland, California 94612

ATTORNEYS FOR APPELLANT

No. 21,019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

. R. FITZSIMMONS,	)
	)
Plaintiff and Appellant,	)
	)
s.	)
	)
RUCE W. GILPIN,	)
	)
Defendant and Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

SUBJECT INDEX

TABLE OF CASES

ARGUMENT

Appellee complains of appellant's recital of the istody of the litigation on the note that is the subject of his action, and then goes on in his Answering Brief to cite orrespondence from this Court to Appellant concerning admini-trative matters in the perfecting of this appeal, and ffidavits of a person not a party to this appeal (Appellee's nswering Brief, pp. 3-5). While these matters may technically part of the record on appeal, they are immaterial to the ssues on this appeal, and could only have been inserted by ppellee's counsel for the purpose of prejudicing Appellant fore this Court. The only issues in this appeal are:) Whether the District Court abused its discretion in smissing this action with prejudice; and (2) Whether that urt abused its discretion in dismissing the action, with without prejudice.

It is true, as Appellee's brief notes (p. 6), that e note that is the subject of the present action has been the bject of prior actions. But it is not true that the merits ve been "threshed" in other courts. As shown in Appellant's ening Brief, the history of the litigation on this note is e of plaintiff's long and arduous pursuit of a judgment, nstrated by Appellee's all too successful evasive tactics.

As also noted in Appellant's Opening Brief, the recent

ses concerned with dismissals for want of prosecution have ated the requirement of finding prejudice to the defendant d absence of stalling tactics on his part. (See cases cited Appellant's Opening Brief, page 12.) The statement in pellee's Brief (p. 10) that "it must be presumed that appellee s prejudiced by the actions of the appellant" is wholly thout substantiation either as a rule of law or as a factual nclusion. The issue of prejudice was not discussed in Link v. bash, 291 F. 2d 542 (1961), affirmed 370 U.S. 626, 8 L. Ed. 2d 4, cited by Appellee as authority for this "presumption" ppellee's Brief, p. 10). On the contrary, the facts here ow nothing in the way of prejudice to Appellee. Appellee uld have avoided having a lawsuit hanging over his head for long period by entering a defense on the merits either in e Lanphier action, or at any time in this action. If the ion on the note is meritorious, then indeed there would be ejudice to Appellee; but it is inconceivable that where pellee contrives to avoid determination on the merits by using even to file a defensive pleading he is "prejudiced" y Appellant's failure to force such a response.

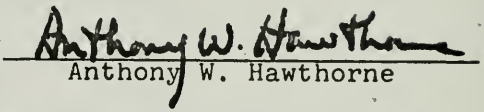
This is clearly an instance where the defendant, swell as the plaintiff, has been responsible for the delay nprosecution of the action. Thus, under the cases cited at ae 12 of Appellant's Opening Brief, the present case is one nwhich dismissal by the District Court constituted an abuse fits discretion, and the judgment of dismissal should be

eversed.

DATED: September 21, 1966.

Respectfully submitted,

FITZSIMMONS AND PETRIS

By 
Anthony W. Hawthorne

Attorneys for Plaintiff and
Appellant EDWARD R. FITZSIMMONS

CERTIFICATION

I, ANTHONY W. HAWTHORNE, certify that in connec-
on with the preparation of this brief, I have examined
les 18 and 19 of the United States Court of Appeals for
e Ninth Circuit, and that, in my opinion, the foregoing
ief is in full compliance with those rules.

Anthony W. Hawthorne

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